IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1301 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GOVINDBHAI SHIVABHAI JADAV - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ SHETHNA for Appellant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 04/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

This appeal has been filed against the judgment and order dated 30th November, 1999 passed in Sessions Case No. 172/91 by the Addl. Sessions Judge, Kheda at Nadiad. By virtue of the impugned judgment, the appellant-accused has been held guilty of the offence punishable under the provisions of sec. 304 Part-II of the Indian Penal Code and has been sentenced to rigorous imprisonment for 10 years with a fine of Rs.10,000/-, in default of payment of fine, to undergo rigorous imprisonment for 2 years and the appellant-accused has also been convicted of the offence punishable under sec. 331 of the IPC and has been sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo rigorous imprisonment for 1 year. The substantive sentences have been ordered to run concurrently.

2. The case of the prosecution against the appellant-accused was as under:

3. The appellant-accused was serving as a Senior Police Sub-Inspector at Petlad Rural Police Station. On 4th February, 1988, around 2.30 p.m., one Bhupendrabhai Chhotbhai Patel, an accused in Petlad Rural Police Station C.R.-II No. 15/88, against whom an offence had been registered under the provisions of sections 352, 504 and 506(2)of the IPC, had been

arrested. At the time of his arrest, he was found to have consumed alcohol and, therefore, an offence under the provisions of Bombay Prohibition Act, 1949 was also registered against him and he was produced before the Judicial Magistrate First Class, Petlad (for short 'JMFC') on 5th February, 1988 at 3.15 p.m. An application submitted by the appellant-accused seeking remand of Bhupendrabhai Chhotbhai was granted, and in pursuance of the order, the appellant was given custody of Bhupendrabhai Chhotabhai on 5.2.1988 at 3.20 p.m. for 24 hrs. Thereafter, at 2.30 a.m. on 6.2.1988, Bhupendrabhai Chhotabhai was found dead in the police custody and, therefore, an offence had been registered against the appellant and other four persons under the provisions of sec. 330 r/w sec. 34 of the IPC.

4. Due to death of Bhupendrabhai Chhotabhai (who has been hereafter referred to as 'the deceased') in police custody, the widow of the deceased also filed a complaint on 3.5.1988, which had been registered as Inquiry Case No. 72/88, alleging commission of offences under sec. 302 r/w sec. 114, 201, 217, 218 and 221 of the IPC by the appellant and other six accused. In pursuance of the said complaint, an order dated 10.5.1990 had been passed by the learned JMFC, Petlad, ordering that case be registered for commission of offences under sec. 302, 201, 217, 221 and 114 of the IPC by the appellant and other persons. It was also ordered that Inquiry Case No. 72/88, which had been filed by the widow against the appellant and others, be tried alongwith with the chargesheet filed against the accused.

5. It is worth mentioning at this juncture that applications had been submitted on behalf of accused Nos. 6 & 7, being Circle Police Inspector, Parasnath Shivmandir Pandey (accused No. 6) and Dr. Vallabhdas Somabhai Shah (accused No. 7) below Ex. 9, 10 and 26 praying for their discharge. Upon hearing the concerned advocates, the learned Addl. Sessions Judge, Nadiad, by an order dated 6th August, 1994, dropped the proceedings against the aforesaid two accused for the reason that necessary sanction for their prosecution under the provisions of sec. 197 of Cr.P.C. had not been accorded by the State Government. Thus, the proceedings continued so far as accused Nos. 1-5 are concerned.

6. A charge-sheet dated 25th November, 1994 had been filed against all the accused by the learned Addl. Sessions Judge, Nadiad alleging that on 4.2.1988 at 2.30 p.m. Bhupendrabhai Chhotabhai had been arrested from village Sonav by the accused and from the time of arrest till the time of his death, the deceased was in police custody and the accused had made an effort to get confession from the deceased and in the said process, the deceased was beaten to such an extent that in normal course, the injuries caused on his body were sufficient to cause his death and as a result of the injuries inflicted upon him, the deceased had died an unnatural death in the police custody and, therefore, the appellant-accused had been charged for committing an offence under sec. 302 r/w sec. 114 of the IPC. Alternatively, it was charged that on the aforesaid date, with an intention

to obtain confession from the deceased and to recover the sword, the accused had caused such severe injuries on Bhupendrabhai Chhotabhai, which in its normal course were sufficient to cause his death and as a result of the said injuries, the deceased had died in police custody and, therefore, the accused were guilty of committing an offence under sec. 331 r/w sec. 34 of the IPC. It is pertinent to note that in pursuance of the aforesaid offences, which had taken place in February, 1988, accused Nos. 1-4 were arrested on 26th January, 1990, accused No. 5 was arrested on 18th August, 1990, accused No. 6 was arrested on 3rd June, 1990 and accused No. 7 was arrested on 13th June 1990. Subsequently, accused Nos. 1-4 were released on bail on 26th June, 1990, accused No. 5 was released on 21st August, 1990, accused No. 6 was released on 6th March, 1990 and accused No. 7 was released on 30th June, 1990.

7. What is significant and peculiar in the instant case is that all the accused are members of the police force and in an attempt to get confession from the deceased, they appear to have inflicted such grave injuries on the deceased, which in normal course were likely to result into death of a person. It is also pertinent to note here that the accused being members of the police force and the investigating agency also being part of the fraternity, leniency appears to have been shown in the course of investigation and possibly for that reason, even though the deceased had admittedly died in police custody, the accused had not even been arrested for a considerably long period of almost 2

years.

8. For the purpose of establishing the prosecution case in the trial, the investigating agency had examined the following 12 important witnesses:

(1)Indiraben Bhupendrabhai Chhotabhai, wife of the deceased, who was subsequently declared hostile, P.W. No. 1 (Ex 61)

(2)Dr. Vallabhdas Somabhai Shah, Medical Officer, (who was accused No. 6 initially), who had performed the first post-mortem at Petlad, P.W.No. 2 (Ex. 63)

(3)Ratilal Somabhai, photographer who had taken photographs of the dead body of the deceased, P.W. No. 3 (Ex. 67)

(4)Dr. Kiritbhai Mithawala, who did not perform post-mortem at Nadiad, but referred the dead body for second post-mortem to the Civil Surgeon, Civil Hospital, Ahmadabad, P.W. No. 4 (Ex. 76)

(5)Jashbhai Patel, farmer, P.W. No. 5 (Ex. 101)

(6)Ratilalbhai Parshottambhai, a farmer, in whose presence the deceased had been arrested, P.W. No. 6 (Ex. 102)

(7)Rambhai Laxmidas Patel, a famer, who was taken by police to see the dead body of the deceased when the body was in police custody, P.W. No. 7 (Ex. 103)

(8)Udaisingh, Police Head Constable, who was in charge of jail guards from 8 am of 5.12.1988 to 8 am of 6.2.1988(who had turned hostile), P.W. No. 8 (Ex. 107)

(9)Dr. Rathindra B. Deshmukh, who had performed the second post-mortem of the deceased on 7.2.1988 in panel with Dr. Patil, P.W. No. 9 (Ex. 108)

(10)Vasantbhai Nagjibhai Solanki, P.S.I., who had accompanied Circle Police Inspector Shri Parasnath Pandey from the night of 5.2.1988 till 6.2.1988 for making investigation with Shri Pandey, who was original accused No. 7, P.W. No. 10 (Ex. 128)

(11)Parasnath Pandey, Circle Police Inspector, the Investigating Officer, who was accused No. 7 initially, who had filed an FIR against the accused for commission of offence u/s 302 of the IPC, P.W. No. 11 (Ex. 129)

(12)Vijaysinh Ishwarlal, Sub-Divisional Police Officer, who had supervised the investigation, P.W. No. 12 (Ex. 134)

9. In the course of the trial, several important documents had been exhibited and they have been referred to by the learned Addl. Sessions Judge in the judgment. They include documents such as complaint filed by the widow of the deceased, first and second post-mortem reports, inquest panchnama, panchnama of the place where the dead body of the deceased was found in police custody, sketch of place of incident, certificates of medical officers, etc.

10. It is an admitted fact that on Friday, 5.2.1988 at 3.20 p.m., when the application for remand submitted by the appellant had been granted, custody of the deceased was given to the appellant and before completion of 24 hrs. of remand, at 2.30 a.m. on

6.2.1988 (Saturday), the deceased was found dead in the police custody. The said fact points an accusing finger of suspicion towards the accused police personnel and their complicity in the incident.

11. Indiraben, PW No. 1 (Ex. 61), the widow of the deceased, who turned hostile has mainly stated in her cross-examination that the deceased was her husband, and on 4.2.1988 around 2.30 p.m. he had been arrested by the police and on 5.2.1988 he was produced before the JMFC, Petlad. An application for bail had been submitted by her for release of the deceased. An application for remand of the deceased had been submitted by the police and, therefore, the deceased had not been released on bail. She has stated that the deceased was in the habit of consuming liquor and about five prohibition cases had been filed against him.

12. Prosecution Witness No. 8 (Exh. 107) Head Constable Udaisinh Motibhai, who was in charge of the Petlad Town police lock-up room, where the deceased had been lodged, has stated that the deceased was the only person who was in the police lock-up room at that time. He has made an effort to show that the deceased was not comfortable and was uneasy at night and as he had made a grievance with regard to his bad health, at 11 p.m. on 5.2.1988 two constables had taken him to a hospital and thereafter he was brought back to the lock-up room, but, he was unable to name those two constables. It is also pertinent to note that at the time when the deceased was sent to the hospital, he was quite serious. Except at the time

when he was taken to the hospital, according to the said witness, the deceased had not been taken out from the police lock-up room. Upon perusal of the extract of the lock-up room register (Ex. 130), it can be seen that the deceased was brought to the lock-up room at 5 p.m. on 5.2.1988 and he was found dead at 2.30 a.m. on 6.2.1988.

13. The prosecution has examined the Investigating Officer, Parasnath Pandey, PW No. 11 (Ex 129). The said witness has stated that the deceased was found to have consumed liquor at the time of his arrest and, therefore, his blood had been examined. As the deceased was found to have expired in police custody, he had been entrusted with the investigation of the said incident and the investigation had been supervised by his higher officer, Shri Vijaysinh, Sub-Divisional Police Officer. He had made an effort to take statement of the widow of the deceased, PW No. 1 (Ex. 61) but he could not record her statement as father of the deceased had not permitted the widow to make her statement. It is pertinent to note here that the widow of the deceased, PW No. 1, (Ex. 61) had turned hostile. In the course of his deposition, Pandey has stated that when the deceased was found dead, an inquest panchnama (Exh. 84) was drawn and post-mortem had been conducted by Dr. Vallabhdas Somabbai Shah, PW No. 2 (Ex. 63). Except slight abrasion on left elbow joint, according to the inquest panchnama (Exh. 84) and post-mortem report submitted by Dr. V.S. Shah, P.W. No. 2 (Exh. 63), there was no injury on the body of the deceased. Only when the family members of the deceased had

insisted for a second post-mortem, the dead body was taken to Nadiad, where Civil Surgeon Dr. Kiritbhai Mithawala, PW No. 4 (Ex. 76) and Dr. Macwan did not conduct the second post-mortem but asked the IO to take the body to B.J. Medical College (Civil Hospital) at Ahmadabad, where the second post-mortem was conducted.

14. The most important evidence which has been considered by the Sessions Court is of Dr. Deshmukh, PW No.9 (Ex.108). Upon perusal of the post-mortem report (Exh. 111) submitted by the said witness, it is crystal clear that several serious injuries had been inflicted upon the deceased, which were anti-mortem in nature. As stated hereinabove, the family members of the deceased were not happy with the first post-mortem report submitted by Dr. V.S. Shah, PW No. 2 (Ex. 63) and, therefore, they had requested the Civil Surgeon, Nadiad, Dr. Mithawala to conduct another post-mortem, but as the civil hospital at Nadiad was not having sufficient facilities, Dr. Mithawala had referred the body to the Civil Hospital, Ahmedabad for conducting another post-mortem and in pursuance of the said request, second post-mortem had been conducted by Dr. Deshmukh, PW No. 9 (Ex. 108) and Dr. Patil at the Civil Hospital, Ahmedabad. The anti-mortem injuries which had been found on the body of the deceased have been stated in detail in the post-mortem report (Ex. 111) and in the deposition of Dr. Deshmukh, PW No. 9 (Ex. 108). The said injuries have not been recorded in the first port-mortem report which had been conducted by Dr. V.S. Shah, PW No. 2 (Ex. 63). It is worth noting here

that Dr. V.S. Shah, who had conducted the first post-mortem, was also one of the accused, namely, accused No. 6. But as stated hereinabove, accused Nos. 6 & 7 had to be dropped because of the fact that requisite sanction u/s 197 of the Criminal Procedure Code had not been accorded for prosecuting the said accused.

15. The injuries appearing on the body of the deceased and on the important internal organs, as reflected from the second post-mortem report (Exh. 111) submitted by Dr. Deshmukh, PW No. 9 (Ex. 108), are narrated herein below:

External injuries

(1) Abrasion present on medial aspect of left elbow, 3.5 cm below the medial epicondyle of the humerus, size 1.5 x 1 cm.

(2) Abrasion present on lateral aspect of the left elbow, 1 x 1 cm.

(3) A linear abrasion present on left side of back in middle region at T8 level, of 4.5 x .5 cm size.

(4) Another linear abrasion 8 cm below external injury No. 3 of size 3.5 x .5 cm.

(5) Bruise, reddish blue in colour with swelling present on lower part of back and buttocks and upper part of back of thigh extending from one side to other in Rail pattern, nearly horizontal. Total 9 identified from above downwards.

(i)Bruise from mid of right part waist to left lateral waist region, size 28 x 3 cm.
(ii)Bruise from upper part of right hip horizontally to left side, horizontal size 33 x 3 cm.
(iii)Upper part mid of right buttock to left buttock, size 27 x 3 cm.
(iv)Bruise from lateral part of right hip to left

in middle region, of size 30 x 2.5 cm.

(v)Bruise on mid of right buttock below (iv), of size 2 x 2.5 cm.

(vi)From posterior margin of right greater trocanter... mid part of both buttocks, size 27 x 2.5-3 cm.

(vii)Another bruise overlapping (vi) but extending slightly downwards, size 25 x 2.5 cm.

(viii)Bruise on lower part of left buttock, of size 9 x 2.5 cm.

(ix)Bruise present on upper part of back of left thigh downwards and laterally, of size 15 x 3 cm.

Internal injuries

Head

(1) Ecchymosis of scalp present in anterior part of parietal region, size 5.5 x 4 cm.

(2) On internal examination underneath external bruise on buttocks, hips, thigh and on lower part of back-extravasation of blood in muscles of these areas have been observed.

Chest

Bruising of chest muscles and muscles of anterior abdominal wall seen on chest, in right and left both sides extending from front to lateral sides. Swelling in bruised muscles appreciated. Intercostal muscles on left side, on front and lateral aspects bruised from 2nd to 9th space, left 3rd costal cartilage is fractured.

Anterior medial border of left lung is bruised for 6 x 6 cm. Both lungs congested. No incision marks seen on lungs

Heart

(1) No incision mark or evidence of examination seen on heart and pericardium

(2) Atheromatous thickening in left coronary artery is found

(3) A bruise, reddish blue in colour present on heart on anterior wall of right and left side over an area of 5 x 3.5 cm. (If superficial, death may not occur?)

(4) This area is bare area of heart. Heart is slightly enlarged, weight of heart 350 gms.

(5) Heart is soft, flabby and empty.

(6) A haematoma is found on left lower part of chest and abdomen just below abdominal wall from 9th rib to iliac crest, of size 35 x 9 x .7 cm.
Stomach is found separate in abdominal cavity, cardiac end tied. Few patches of bruise seen on anterior wall of stomach, size 2 x 2 to 1.5 x 1 cm. Stomach is empty. Small intestine empty but gases present. Large intestine-little amount of faecal matter.

Liver

(1) Slight cirrhotic changes seen in liver and all organs are bearing P.M. Incision marks

(2) All the organs and congested.

16. The Sessions court did not find any reason to disbelieve the aforesaid anti-mortem injuries, which had been inflicted upon the deceased. The said post-mortem had been conducted by a panel of doctors consisting of Dr. Deshmukh, PW No.9 (Ex. 108) and Dr. Patil. Allegations were made by the appellant that certain words had been added in the post-mortem report subsequently by Dr. Patil. The Sessions Court did not find any substance in the said allegation for the reason that the said correction/incorporation had been duly initialled by Dr. Patil and the said incorporation in the post-mortem report was not likely to make any material change which would tilt

the balance in favour of the appellant. The said change, as a result of incorporation of words, has been duly explained by Dr. Deshmukh, PW No. 9 (Ex. 108).

17. Upon appreciation of the aforesaid evidence adduced before the Sessions Court, the Sessions Court delivered the impugned judgment and order, whereby accused No. 1, P.S.I. Govindbhai Shivabhai Jadav, who was handed over custody of the deceased, has been held guilty of offences under sec. 304 Part-II and sec. 331 of the IPC, whereas, in absence of sound evidence, other accused have been acquitted.

18. Learned advocate Shri K.J. Shethna appearing for the appellant-accused has submitted that the charge had been levelled against 5 accused collectively and no evidence has been led by the prosecution to prove that accused No. 1 was the only responsible officer who was guilty of the offences held to be committed by him.

19. He has submitted that the evidence adduced by Dr. V.S. Shah, PW No. 2 (Ex. 64), who had conducted the first post-mortem, denotes that there were no serious injuries on the body of the deceased. According to the learned advocate, the said evidence has gone unchallenged and, therefore, there was no reason for the Sessions court to disbelieve the said evidence. It has been submitted by him that when there were two different post-mortem reports, one referring to anti-mortem injuries and another one not recording any anti-mortem injuries on the body of the

deceased, according to the law laid down by the Hon'ble Supreme Court, the Sessions Court ought to have accepted the post-mortem report which did not refer to any anti-mortem injuries.

20. By analogy, relying on the decision of the Hon'ble Supreme Court in the case of **Harchand Singh and another Vs. State of Haryana, AIR 1974 SC 344,** he has submitted that when two different sets of evidence are adduced and one of them is in favour of the accused, the court should accept the evidence, which is in favour of the accused. It has been therefore submitted by him that the trial court has committed an error by not accepting the post-mortem report of Dr. V.S. Shah, PW No.2 (Ex. 63).

21. Thereafter it has been submitted by him that the Sessions court has considered the photographs (Exs. 68, 69 & 70) of the deceased, which had been taken by photographer Ratilal, PW No. 3 (Ex. 67), who has stated in his deposition that someone named Kanubhai had taken him to the morgue, at the civil hospital, Ahmedabad, where the dead body of the deceased was lying and he was asked to take photographs of the said dead body. The photographer did not know the deceased. According to the learned advocate, Kanubhai, who had identified the body of the deceased to the photographer, ought to have been examined so as to prove that the photographs were in fact of the deceased. By not examining Kanubhai, the prosecution has failed to establish a vital and necessary link for establishing that the photographs were that of the deceased and of none else.

22. So as to substantiate his case, learned advocate Shri Shethna has also relied upon the judgment delivered by the Hon'ble Supreme Court in the case of **T.V. Eachara Warrier v. T.O. Kunchiraman Nambiar & Ors.,** 1993 Supp. (3) SCC 381. It has been submitted by him that when some of the accused have been acquitted, there is no justifiable reason for convicting the appellant-accused alone. Relying upon the aforesaid judgment, it has been submitted by him that the learned Addl. Sessions Judge has committed an error while convicting the appellant for the same offence because similar treatment should have been given to the appellant also. As all other accused have been acquitted, there was no justifiable reason for not acquitting the appellant-accused No 1.

23. He has also relied upon the judgment delivered by the Hon'ble Supreme Court in the case of **Mohan Singh & Anr. v. State of Punjab,** AIR 1963 SC 174 to substantiate his case to the effect that as other accused had been acquitted, the appellant should also have been acquitted. We do not agree with the said submission as facts and law involved in the case relied upon by him have no relevance in this case at all.

24. Learned advocate Shri Shethna has also relied upon the following judgments to substantiate his case:

(1)Ram Tahal & Ors. v. The State of U.P., 1972(1)

SCC 136.

(2)Tarachand Damu Sutar v. The State of Maharashtra, 1962 SC 130.

(3)Sarwan Singh Rattan Singh v. State of Punjab, 1957 SC 637

(4)Kartar Singh v. State of Punjab, 1994(3) SCC 569

(5)State of A.P. v. Patnam Annandam, 2005(9) SCC 237.

(6)Krishna G. Patil v. State of Maharashtra, AIR 1963 SC 1413.

25. On the other hand, learned APP Shri K.T. Dave has argued in support of the judgment delivered by the Sessions Court by submitting that the deceased had died while in police custody. At the time when custody of the deceased was handed over to the appellant, the deceased was absolutely hale and hearty and within 24 hrs., that is, after he was remanded to the police custody, the deceased had lost his life. According to him, as per the provisions of sec. 106 of the Indian Evidence Act, 1872 the burden of proof was on the appellant to establish as to what happened in the police custody and as to how the deceased lost his life as that was exclusively within his special knowledge. He has fairly submitted that normally it is for the prosecution to establish as to how the accused is guilty, but looking to the peculiar facts and circumstances of the case and especially considering the fact that the deceased was in police custody, except the appellant nobody could have adduced any evidence with regard to what transpired in the police custody and, therefore, the

burden had been shifted upon the accused to explain the circumstances leading to death of the deceased. This is an exceptional case where the burden was to be discharged by the accused because he alone was having the evidence which only he could have adduced before the court.

26. He has thereafter submitted that the persons who had been charged with the offence are police personnel and the investigation was also conducted by other police personnel. According to him, as the appellant and the investigating agencies belong to the same fraternity, all efforts were made by the investigating agency to adopt softer attitude towards the appellant. He has drawn our attention to the fact that though the offence had been committed on 6.2.1988, the accused had been arrested after 2 years and thereafter also they remained free as they had been enlarged on bail. According to him, the accused ought to have been arrested immediately as it was a case of custodial death and more particularly when the deceased was normal in all respects at the time when he was taken to the police custody at 3.20 pm on 5.2.1988. In the circumstances, one can safely presume that the reason for his death, which was anti-mortem injuries, could have been only on account of severe injuries inflicted by the appellant or at his instance by his subordinates, as the appellant was the person who was having custody of the deceased. It has been fairly submitted by him that as no evidence had been adduced against other accused, who were subordinate to the appellant-accused No. 1, the trial court has rightly discharged

them. As custody of the deceased was handed over to the appellant at 3.20 p.m. on 5.2.1988 as shown by the order passed below application for remand by the JMFC, Petlad (Ex. 138), presumption would be that the deceased had been beaten to death only by the person in whose custody the deceased was.

27. He has, therefore, submitted that upon appreciation of the evidence, the Sessions Court has rightly held that the appellant was guilty of the offences alleged to have been committed by him.

28. The learned APP has cited judgments delivered by the Hon'ble Supreme Court in the cases of **Gauri Shanker Sharma etc. v. State of U.P. Etc.,** AIR 1990 SC 709, **State of U.P. v. Ram Sagar Yadav & Ors**., AIR 1985 SC 416, **State of M.P. v. Lattora**, 2004 SCC (Cri.) 1195, **Sucha Singh v. State of Punjab**, 2001(4) SCC 375, and **State of West Bengal v. Mir Mohammad Omar & Ors**., 2000(8) SCC 382. The aforesaid judgments clearly lay down law to the effect that when custody of a person is with someone, be that a police officer or a protector, the person having custody is the only person, who can explain the circumstances in which the injuries are inflicted upon the victim. In the instant case, unfortunately, the victim has expired. It was only for the appellant to explain as to how the injuries had been inflicted upon the deceased. As the victim was in police custody, it was practically impossible for anyone to find out as to how the injuries were inflicted upon the victim.

29. The learned APP has added in his arguments that though the offence in relation to which the deceased had been arrested had taken place within the jurisdiction of Petlad Rural Police Station, instead of lodging him in the police lock-up room of Petlad Rural Police Station, for the reasons best known to the appellant alone, the victim had been locked up in the Petlad Town Police Station. It has been submitted by him that each police station is having its separate police lock-up room. According to the learned APP, at Petlad Town Police Station, except the deceased, there was no other accused in the police lock-up room at the relevant time. Possibly, to have undue advantage of that situation, after inflicting severe injuries upon the deceased or for inflicting injuries upon the deceased, the deceased might have been lodged in the lock-up room of Petlad Town Police Station instead of lodging him in the lock-up room of Petlad Rural Police Station.

30. For the aforesaid reasons, the learned APP has submitted that the conviction ordered by the learned Addl. Sessions Judge is just, legal and proper. It is also in the interest of the public at large because it is always the duty of the police to ensure that subjects of the State are properly protected. But, instead of protecting a person, perhaps, in an enthusiasm to extract confession or some vital information, which possibly the deceased was not having, the deceased was beaten to death in police custody. He has, therefore, submitted that the appeal deserves to be dismissed and the judgment and

order of conviction deserves to be confirmed.

31. We have heard the learned advocates at length and have carefully gone through the evidence adduced before the trial court. We have considered the ocular evidence as well as documentary evidence so as to find out whether the order of conviction and quantum of punishment are justified.

32. This is a case where a special effort has been made by the police fraternity to help a fellow police officer at all stages. In spite of the fact that the deceased had died on account of severe beating by the accused in police custody, all possible efforts were made to see that the accused goes scot-free. First, effort was made to see that the death of the deceased is shown on record as an accidental death. Possibly, when it was found that it would not be convincing to convert the offence into an accidental death, effort was made to frame the accused for commission of offence under sec. 330 of the IPC, but unfortunately for the accused, on account of the complaint filed by the widow of the deceased and in pursuance of an order passed by JMFC, Petlad in Inquiry Case No. 72/88 dated 10.5.1990, an offence under sec. 302 and sec. 331 r/w sec. 34 of the IPC had been registered against all the accused police personnel.

33. Before we say anything with regard to the nature of evidence, which had been adduced, we are conscious of the fact that the deceased was a person with normal health at the time when he was arrested on

4.2.1988 around 2.30 p.m. He was produced before the learned JMFC, Petlad on 5.2.1988. On 5.2.1988, an application for his remand had been submitted by the appellant at 3.15 p.m. and the remand application was granted at 3.20 p.m., on the same day. Custody of the deceased was handed over to the appellant as clearly shown on the order passed below the remand application (Ex. 138)

34. Thus, it is not in dispute that custody of the deceased from 4.2.1988 since his arrest, was with the appellant and after 3.20 p.m. on 5.2.1988 the deceased was taken to the police lock-up room and he was lodged therein at 5 p.m. Petlad being a small town, we firmly believe that 1 hr. 40 mts. could not have been taken by the appellant to take the deceased to the police lock-up room and that too, to a lock-up room which was meant for lodging the accused, who had committed offences within the jurisdiction of Petlad Town Police Station. The trial court has rightly considered this time lag as an important factor which has not been explained by the appellant anywhere. Once again, we say that we are conscious of the fact that though the burden lies on the prosecution to prove, when custody of the deceased was handed over by the court to the appellant-Police Officer, it was for the appellant-Police Officer to explain as to what happened to the deceased after having his custody. Looking to the observations made by the learned Addl. Sessions Judge that the town in which the court premises and the police station are situated, being a small one like Petlad, we feel that more than 10-15 minutes should not have been taken by

the appellant to take the deceased to the police lock-up room. The case is all the more serious because the appellant-accused is a police officer, who, as the protector of law, has tried to take undue advantage of the inherent lacuna of the system of which he is a vital part.

35. There are certain other important and relevant facts. The deceased had been arrested in a prohibition case also. As he had been arrested in a prohibition case, his blood sample was taken so as know the quantity of alcohol which his blood contained. We are referring to this fact because at the time when his blood sample was taken, alcohol was found to the extent of 0.155% (ethyl alcohol) and 0.275% (methyl alcohol) as per Ex. 98, the report submitted by the Forensic Science Laboratory. Thus, if the accused had in fact consumed liquor, his blood could not have contained more than the aforestated quantity of alcohol at the time of his death because quantity of alcohol in the blood gradually diminishes as the kidney, through its function, gradually removes alcohol from the blood of the person who has consumed alcohol.

36. It is very important to note here that upon his death, when blood was taken from the body of the deceased and when it was sent to Forensic Science Laboratory, 31.92% mg and 107.12% mg of ethyl and methyl alcohol, respectively, was found in his blood as it can be seen from the report submitted by FSL (Exh. 97). It is really very strange as to how the contents of alcohol in the blood of the deceased

increased to such an extent. This could have happened only if the accused had consumed liquor while in police custody on 5.2.1988 after he was remanded to police custody at 3.20 p.m. In other words, on 4.2.1988 when the deceased had been arrested, his blood sample was taken and thereafter the deceased had no opportunity to consume alcohol at his volition or without knowledge and/or permission of the appellant-accused because Gujarat is a dry state where consumption of alcohol is an offence as per the provisions of the Bombay Prohibition Act, 1949. For some time before he was produced before the learned JMFC, he was in police custody as he had been arrested on 4.2.1988 and upon grant of remand by the JMFC, Petlad on 5.2.1988 at 3.20 p.m.. he was continued in custody of the appellant Police Officer. Substantial increase of alcohol in the blood of the deceased denotes that either he was constrained to drink alcohol at the instance of the police personnel for obtaining confessional statement or some information from him or so as to make a show that something went wrong with his body because of consumption of heavy dose of alcohol. Perhaps for that reason widow of the deceased, PW No.1 (Ex. 61), who had subsequently turned hostile, has specifically stated in the chief (Ex.61) that the deceased was in habit of consuming liquor and about 5 prohibition cases had been filed against him in the past.

37. We cannot refrain from expressing our feelings here that normally a woman, who has lost her husband, would never turn hostile and would never make a statement, which would result into acquittal of the

persons, who had become the cause of her husband's death. We firmly believe that the appellant Police Officer or at his instance, somebody else must have compromised or arranged some kind of settlement with the widow of the deceased, otherwise in normal circumstances, no complainant, much less the wife of the deceased, would turn hostile. The widow, PW No. 1, (Ex. 61) has stated in the chief that she had met her husband when he was produced before the learned JMFC, Petlad. At that time, of course as a hostile witness, she has stated that her husband had some gastric problem. Though she was a hostile witness, she did not say anything about any injury, inflicted upon the deceased at the time when he was produced before the learned JMFC, Petlad, and this fact denotes that all injuries were inflicted upon him after he was remanded to police custody. We once again note that initially the accused were not charged for offences under sec. 302 of IPC, but only in pursuance of a complaint filed by the widow, sec. 302 had been added in pursuance of order dated 10th May, 1990 passed by the learned JMFC, Petlad. It would not be out of place to mention here that the deceased expired in February, 1988 and a final order in pursuance of the complaint of the widow, PW No. 1, (Ex.61) was passed on 10th May, 1990 and the trial began in Dec. 1997. It is deplorable that she has turned hostile. In fact, in a complaint filed before the JMFC, Petlad (in pursuance of which the accused was tried for an offence under sec. 302) she had said on oath that her husband was severely beaten by the appellant as she could not give the entire amount of bribe demanded by the appellant etc. and she had seen

dead body of the deceased with several injuries (torture by the appellant supported by evidence has been referred to in an order below Ex. 1 in Inquiry Case No. 72/88). Passage of time of almost 9 years might have constrained the widow of the deceased to surrender to circumstances which must have constrained her to become hostile to the case which she herself had initiated. We refrain ourselves from elaborating or analyzing further on this point.

38. We do not agree with the submission made by learned advocate Shri Shethna that simply because other accused have been acquitted, appellant-accused No. 1 should also have been acquitted. We have already stated hereinabove that custody of the deceased was handed over to the appellant-accused No. 1. He was the sole person, who was responsible to retain custody of the deceased during the period of remand. If he has failed in performance of his duties in retaining the custody of the deceased properly, as per provisions of sec. 106 of the Indian Evidence Act, the burden is on the appellant to establish that in spite of due care taken by him, for the reasons beyond his control something unexpected happened to the deceased and the deceased expired. If someone else had even tried to beat him, the appellant should have protected the deceased or he should have explained it as the deceased was in the custody of the appellant. Such an evidence has not been led by the appellant. If, without his knowledge, the deceased was beaten by someone, then that is nothing but gross negligence and dereliction of duties on his part and in that case, the appellant

cannot be given benefit of his own wrong by acceptance of such a defence.

39. It is also pertinent to note that the prosecution could not establish the case against rest of the accused as no evidence could be furnished to indict the remaining accused so as to bring them under the scope of sec. 34 of IPC. Simply because the role played by the remaining accused, who have been acquitted, could not be established, in our opinion, appellant cannot escape from his responsibility by taking undue advantage of the principle laid down in the judgment delivered in the case of **T.V. Eachara Warrier** (supra).

40. Learned advocate Shri K.J. Shethna appearing for the appellant has made an effort to show that Head Constable Udaisingh, PW No. 8 (Ex. 107), who was in charge of the police lock-up room, should have been believed by the Sessions Court when, in his examination-in-chief, he had stated that between 10 p.m. and 11 p.m. the deceased was taken to a hospital by two constables. According to the learned advocate, there is no reason to disbelieve Udaisingh, PW No. 8 (Ex. 107) because the deceased must have been taken to the hospital when he was not well and possibly during that period something might have gone wrong. We do not agree with the submission made by the learned advocate in this regard. The said witness has turned hostile. He has made statements which are contrary to the record. He has stated certain things which have not been corroborated. He is a person who was head of 3 constables, whose duty

was to guard the police lock-up room. In the chief he has stated that the deceased was brought to the police custody at 3 p.m. after producing him before the court. The said statement made by him is absolutely incorrect because, according to the entry made by him in the lock-up room register (Ex.130), the deceased was brought to the lock-up room at 5 p.m. on 5.2.1988. The said register has been signed by Udaisingh, PW No. 8 (Ex. 107) himself. He has made an effort to show that immediately after remand order was granted, the deceased was brought to the police lock-up room. He has made an effort to help the appellant so as to show that the deceased was not taken anywhere after the order of remand had been granted.

41. We have also noted hereinabove that remand for 24 hrs. was granted and at 3.20 p.m. on 5.2.1988 and custody of the deceased was handed over to the appellant and the deceased was brought to the lock-up room at 5 p.m. Both the aforesaid facts are supported by documentary evidence and in spite of the said fact, Udaisingh, PW No. 8 (Ex. 107) has stated that the deceased was brought to the lock-up room from the court at 3 p.m. There is another important point which constrains us to disbelieve the said witness. He has stated that at 10 p.m. on 5.2.1988, the deceased was taken out of the police lock-up room to a hospital by two constables and he was brought back to the lock-up room at 11 p.m. Upon being asked, he was unable to state names of those two constables, who had taken the deceased to the hospital. If in fact it was true, the appellant, who

was in overall charge of the deceased, would have definitely said as to who was the doctor who was consulted at 10 p.m. on 5.2.1988. Of course, Dr. V.S. Shah, PW No. 2 (Ex. 63), who was once upon a time one of the accused, did not say anything in his Chief with regard to having examined the deceased, has said one line in his cross-examination that he had examined the deceased and had suggested that the deceased should be admitted to hospital, but the deceased had refused to get admitted in the hospital. We do not believe the said story of Dr. V.S. Shah, PW No. 2 (Ex. 63) for the simple reason that no accused, who is in police custody, upon being seriously ill, would prefer to remain in police lock-up room rather than in a hospital. The same conclusion has been arrived at by the learned Addl. Sessions Judge and we do not see anything wrong in the said conclusion arrived at by the learned Judge. Thus, we also believe that in fact the deceased was not taken to any hospital, but he was found dead around 2.30 a.m. on 6.2.1988 because of the anti-mortem injuries referred to in the post-mortem report of Dr. Deshmukh, PW No. 9 (Ex. 108). We strongly feel that Dr. V.S. Shah, PW No. 2 (Ex. 63) has only made an effort to show that the deceased had been taken out of the lock-up room for 1 hr. so as to see that some benefit of doubt is given to the appellant to make out a case that during that period the deceased might have been beaten by someone or someone might have offered liquor to him. Had the deceased been taken to a government hospital where Dr. Shah was posted, there would have been some case papers to indicate that the deceased was examined in the hospital, but

absence of such case papers do not support the version of Udaisinh, P.W. No. 8 (Ex. 107) or Dr. V.S. Shah, PW No. 2 (Ex. 63).

42. There is no reason for us to believe that the Sessions court committed any error in appreciating the evidence of Dr. Deshmukh, PW No. 9(Ex. 108). The first post-mortem was conducted by Dr. V.S. Shah, PW No. 2 (Ex. 63), according to whose post-mortem report, except a small abrasion on the left elbow joint of the deceased, no injury was found on the body of the deceased. According to his post-mortem report, the cause of death could have been cardiac failure. Even the inquest panchnama (Ex. 84), which was drawn in the police lock-up room, where the dead body was lying, does not reveal mark of any injury except the abrasion. We note here that Dr. V.S. Shah, PW No. 2 (Ex. 63) was initially one of the accused, but for want of sanction for prosecuting him under the provisions of sec. 197 of the Cr.P.C., the proceedings against the said accused had been subsequently dropped. Only on technical reasons the prosecution could not proceed further against the said witness. We note the fact that Dr. Deshmukh, PW No. 9 (Ex. 108), who had conducted the second post-mortem on the deceased, has specifically stated that heart of the deceased was intact and there was not a single sign of cut or rupture on the heart. Possibly, the scalpel of Dr. V.S. Shah, PW No. 2 (Ex. 63) had not even touched the heart of the deceased. It is very strange as to how Dr. Shah, PW No. 2 (Ex. 63) came to the conclusion that the deceased had died possibly because of cardiac failure without even

examining heart of the deceased. For this reason, in our opinion, the trial court was absolutely justified in discarding the evidence adduced by Dr. Shah, PW No. 2 (Ex. 63) and the post-mortem report (Ex. 64) submitted by him.

43. We have carefully examined the evidence adduced by Dr. Rathindra Deshmukh, PW No. 9 (Ex. 108), who had conducted the second post-mortem. The second post-mortem was conducted by a panel of two doctors consisting of Dr. Deshmukh, PW No. 9 (Ex. 108) and Dr. Patil of B.J. Medical College/Civil Hospital, Ahmedabad. We have gone through the evidence adduced by Dr. Deshmukh, PW No. 9 (Ex. 108) and the post-mortem report (Ex. 111). Upon perusal of the post-mortem report and upon going through the deposition of Dr. Deshmukh, PW No. 9 (Ex. 108), we find that the heart of the deceased was intact and there was not a single scar on the heart, which means that Dr. V.S. Shah, PW No. 2 (Ex. 63), who had conducted the first port-mortem, had not opened the heart at all. In the aforesaid circumstances, we fail to understand as to how, without examining or even opening the heart of the deceased, Dr. V.S. Shah, PW No. 2 (Ex. 63) came to the conclusion that possibly the deceased had died of cardiac failure. The learned Addl. Sessions Judge, therefore, did not agree with the conclusion arrived at by Dr. V.S. Shah, PW 2 (Ex. 63) about the reason for death of the deceased. We have already narrated the anti-mortem injuries found by Dr. Deshmukh, PW No. 9 (Ex. 108) on the body of the deceased. There is no reason for us to disbelieve the panel of doctors, who had conducted the second post-mortem.

Both the doctors are well qualified in the field of forensic science, whereas Dr. V.S. Shah, PW 2 (Ex. 63) is a Class II officer from the Gujarat Medical Services cadre, and is not having any specialized knowledge in the field of forensic science.

44. The deposition of Dr. V.S. Shah, PW No. 2 (Ex. 63) does not inspire confidence for one more reason. In his cross-examination he has said that he had examined the deceased. Had it been true, he would have given some more details with regard to the ailment which the deceased was suffering from. He would have made notings in the case papers because he is a doctor attached to a government hospital. In a government hospital whenever any patient is brought, whether an indoor or outdoor patient, his medical case papers are invariably prepared. If the deceased had been taken to Dr. Shah, PW No. 2 (Ex. 63) on 5.2.1988 around 10 p.m., Dr. Shah would have surely prepared the case papers and would have noted his observations, diagnosis or prognosis with regard to the ailment, which the deceased was having and no doctor would ever permit a serious patient to leave the hospital, especially when the patient is so serious and more particularly when he is coming from police custody. We are, therefore, inclined to believe that in fact the deceased had not been taken out of the police custody on 5.2.1988 at 10 p.m. and Dr. Shah, PW No. 2 (Ex. 63) had not examined him at that time.

45. Once again, coming to the evidence adduced by Dr. Deshmukh, PW No.9 (Ex. 108), we find an element

of truth and he has withstood a tough cross-examination. He has explained the reason for which the word 'congested' was inserted and not only he, even we believe that in absence of that inserted word, the consequence would not have been different. Had the intention of Dr. Patil been to interpolate a word in a surreptitious manner, Dr. Patil would not have put his initial as a mark of giving authenticity to that insertion. In fact, the mistake which had been committed earlier had been rectified by Dr. Patil. Even if the mistake was not that serious, normally, a sound professional person would never permit any mistake to remain on record and possibly for that reason he inserted the word by putting his initial so as to give authenticity to the insertion of the word and so as to make his record complete and correct. In fact, we would like to appreciate the fact that a mistake which had been committed earlier had been rectified by putting that word and he had put his initials thereafter. Thus, we believe that the report of Dr. Deshmukh, PW No. 9 (Ex. 63) is correct and the cause of death of the deceased can be said to be on account of brutal beating given to the deceased in the police custody.

46. An effort was made by learned advocate Shri K.J. Shethna by submitting that Dr. Deshmukh P.W. No. 9 (Exh. 108) was criticised in one of the judgements by a Sessions Court. When we asked him to pin point the criticism, he could not show the nature of the adverse comment made by the concerned Court. In our opinion, even if the said Doctor had made some mistake in the past, that would not mean that his

credibility should be doubted and the post-mortem report of a panel consisting of Dr. Deshmukh P.W. No. 9 (Exh. 108) should be ignored. Moreover, Dr. Deshmukh should have been confronted with the said judgement (Exh. 142) but the said judgement was referred to by the appellant when he had made his statement under Section 313 of the Criminal Procedure Code. In the circumstances, efforts of the learned advocate are absolutely futile.

47. The Hon'ble Supreme Court has observed in the case of **State of M.P. v. Shyamsunder Trivedi & Ors.,** 1995(4) SCC 262 that at times, in police custody the accused are beaten and in all such cases hardly any evidence is available to establish torture of the police. In the instant case, the deceased was an accused in offences pertaining to sections 352, 504 and 506(2) of the IPC; and in a prohibition case. We do not see any justifiable reason for giving such a brutal treatment to an accused in such a case. We would not like to repeat the nature of injuries referred to in the report, but looking to the gravity of the anti-mortem injuries inflicted upon the deceased, in our opinion, in normal course, the injuries were sufficient to cause death of the deceased. Looking to the facts of the case, we are constrained to observe that in the case of custodial death, normally no evidence is available with the prosecution to book the real culprit. Investigating agency and the appellant belong to the same fraternity and normally there would be a tendency to help fellow men and the investigating agency in such situations goes soft towards another member of the

fraternity.

48. The Hon'ble Supreme Court has also observed in the case of **State of M.P. v. Shyamsunder Trivedi** (supra) that “in a case of custodial death or in a case of police atrocity, generally ocular or other direct evidence is never available.” According to the Hon'ble Supreme Court, “it is the ground reality that rarely in cases of police torture or custodial death direct ocular evidence of the complicity of the police personnel would be available. It would be only the police officials alone who can explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues.” The Hon'ble Supreme Court has also observed that “exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, wold result in miscarriage of justice and would make the justice delivery system a suspect. If a person dies in police lock-up, there would hardly be any evidence available to the prosecution to directly implicate the police personnel with the torture and, therefore, the courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society governed by the rule of law and it poses a severe threat to any orderly civilized society.”

49. As the deceased was in the police custody of the appellant and when there is not even a whisper from the side of the appellant as to what happened to the deceased, who was taken into police custody, in our opinion, looking to the law laid down by the Hon'ble Supreme Court in the case of **State of M.P. v. Shyamsunder Trivedi** (supra) as well as in the case of **Dileep Singh v. State of Haryana**, AIR 1993 SC 2119, there is no reason for this court to set aside the impugned order passed by the learned Addl. Sessions Judge.

50. While entrusting investigation relating to custodial death to the CBI, the Hon'ble Supreme Court, in the case of **Ram Rakha v. State of Punjab,** AIR 2000 SC 3421, has observed that when such deaths occur it is not only to the public at large that those holding custody are responsible; they are responsible also to the courts under whose orders they hold such custody. Looking to such observations made by the Supreme Court, we also feel that the appellant is guilty of a heinous crime and there should not be any reason for the courts to take any lenient view in such matters.

51. The submission with regard to not examining Kanubhai is not at all fatal to the prosecution. Photographer Ratilal P.W. No. 3 (Exh.67) was shown body of the deceased by Kanubhai, who was not examined. In our opinion, even without evidence of photographer Ratilal, P.W. No. 3 (Exh.67), the case against the appellant can be very well proved and,

therefore, we do not find substance in the said submission.

52. In our opinion, the conclusions drawn from the circumstances are so as to negative the innocence of the appellant. There is no evidence inconsistent with the guilt of the appellant and, therefore, in our opinion, the circumstantial evidence is sufficient in this case so as to confirm the conviction.

53. In the circumstances, the appeal is dismissed and the judgment and order dated 30.11.1999, passed by the learned Addl. Sessions Judge, Kheda at Nadiad in Sessions Case No. 172/91 is confirmed. The bail bond stands cancelled.

54. At this stage, learned advocate Shri Shethna has prayed for 8 weeks' time so as to enable the appellant-accused to surrender. In our opinion, the time prayed for by the learned advocate is much more than required. In our opinion, once the order of conviction has been confirmed, the appellant is bound to surrender immediately. We have noted the fact that the trial has taken substantially long time. Much delay had been caused in initiation of the trial and even after completion of the trial all possible efforts had been made by the appellant to see that the proceedings are delayed by filing several miscellaneous applications. However, looking to the facts of the case, we grant time of 5 weeks from

today to the appellant to surrender.

(Anil R. Dave, J.)

(K.S. Jhaveri, J.)

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